UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1206

MICHAEL T. COLLINS, *Appellant*

v.

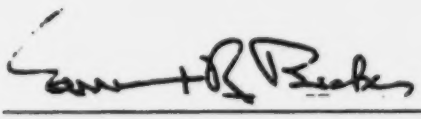
MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS; JOSEPH WALSH, individually; JAMES A. FREY, individually; EDWIN NEGRON, individually; ALFRED RICCI, individually; MARK GRIFFITH, individually; FRANK GRIFFITH, individually; DAVID DOMBROSKI, individually, JULIO M. ALGARIN, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY; DELORES MARTIN, INDIVIDUALLY; LAWRENCE ROTH, IN HIS OFFICIAL CAPACITY; UNITED STATES OF AMERICA
(D.C. Civ. No. 95-04220)

Present: BECKER, *Chief Judge,* SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and RENDELL, *Circuit Judges,*

ORDER

A majority of the active judges having voted for rehearing *en banc* in the above appeal, it is ORDERED that the Clerk of this Court list the above case for rehearing *en banc* at the convenience of the Court.

BY THE COURT:



CHIEF JUDGE

DATED: FEB 03 1999

Filed May 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1206

MICHAEL T. COLLINS,

Appellant

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS; JOSEPH WALSH, individually; JAMES A. FREY, individually; EDWIN NEGRON, individually; ALFRED RICCI, individually; MARK GRIFFITH, individually; FRANK GRIFFITH, individually; DAVID DOMBROSKI, individually, JULIO M. ALGARIN, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY; DELORES MARTIN, INDIVIDUALLY; LAWRENCE ROTH, IN HIS OFFICIAL CAPACITY; UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-04220)
District Judge: Honorable Norma L. Shapiro

Argued November 17, 1998

BEFORE: BECKER, *Chief Judge*, GREENBERG, *Circuit Judge*, and McLAUGHLIN,* *District Judge*

Reargued en banc April 23, 1999

BEFORE: BECKER, *Chief Judge*, and SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and RENDELL, *Circuit Judges*

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*Honorable Sean J. McLaughlin, Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

(Filed: May 13, 1999)

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1. Walter S. Jenkins argued before the panel but not the court en banc. David Richman and Edward R. Cohen argued before both the panel and the court en banc.

OPINION OF THE COURT

GREENBERG, *Circuit Judge*:

I. BACKGROUND

This matter is before this court on an appeal from an order entered February 17, 1998, in the United States District Court for the Eastern District of Pennsylvania. In 1995, appellant Michael Collins brought this action under 42 U.S.C. § 1983 alleging that the defendants violated his constitutional rights while he was incarcerated in the Montgomery County Correctional Facility in Montgomery County, Pennsylvania. The court granted Collins leave to proceed *in forma pauperis* on July 26, 1995, and on November 17, 1995, Collins moved for appointment of counsel. Upon request of the district court, the firm of Pepper, Hamilton & Scheetz agreed to represent Collins in pursuing several of his claims. The district court made this appointment on January 31, 1996.

On April 26, 1996, approximately three months after Pepper, Hamilton & Scheetz agreed to represent Collins and less than three months after the district court made the appointment, the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), became effective. The PLRA significantly limits the attorney's fees that a court may award a prisoner recovering a monetary judgment in a civil rights action by placing a cap both on an attorney's maximum hourly rate and on the total amount of attorney's fees recoverable from a defendant. Moreover, the PLRA requires that a portion of a monetary judgment recovered by a plaintiff be applied to satisfy attorney's fees. *See* 42 U.S.C. § 1997e(d).

Collins' action was tried in December 1996, after the effective date of the PLRA, before a jury that returned a verdict against two of the ten defendants and awarded Collins compensatory damages of $15,000 and punitive damages of $5,000 on a claim arising out of an attack on him by a guard dog. As a partially successful civil rights

litigant under 42 U.S.C. § 1983, Collins moved for an award of attorney's fees of $80,122.75 pursuant to 42 U.S.C. § 1988.[2] Collins recognized the possible effect of the PLRA on his application but raised an equal protection challenge to the Act. Subsequently, on July 11, 1997, the court permitted the United States to intervene under 28 U.S.C. § 2403 to defend the constitutionality of the PLRA.

The court in an opinion dated January 9, 1998, held that Collins' application for attorney's fees for services performed after the PLRA became effective on April 26, 1996, was subject to the PLRA's attorney's fees limitations. The court, however, in a determination not challenged on this appeal, held that Collins was entitled to an award of attorney's fees for pre-PLRA legal services without regard for the Act's limitations. It accordingly directed Collins to submit a revised fee petition conforming with the PLRA for the time Pepper, Hamilton & Scheetz spent both in and out of court after April 26, 1996. Moreover, the court upheld the constitutionality of the attorney's fees provisions of the PLRA.

On January 26, 1998, Collins filed a revised fee petition that sought an award of $7,789.75 without regard for the PLRA limitations for services before April 26, 1996, but which reduced his request for services performed thereafter from $72,333 to $30,000 in compliance with the PLRA. Collins calculated this post-PLRA figure as $30,025.30 in gross fees, based on the applicable hourly rate, reduced by $25.50 in accordance with the PLRA limitations. The defendants raised no issue with respect to mathematical calculations in this revised petition with respect to services either before or after the enactment of the PLRA, and the district court granted this revised fee petition by order entered on February 17, 1998. The court at that time divided the responsibility for the attorney's fees subject to the PLRA on the basis of 97.5% or $29,250 to the defendants and 2.5% or $750 to Collins. Collins filed a timely notice of appeal from this fee award on March 13, 1998.[3] The defendants have not cross-appealed and

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2. He also moved for costs but the parties raise no issue regarding costs on this appeal.

3. The defendants (not including the United States) contend that Collins' appeal is untimely because he filed it more than 30 days after the

consequently they acquiesce in the district court's allowance of fees for pre-PLRA services without regard for the Act's limitations. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a), and we have jurisdiction under 28 U.S.C. § 1291. Following argument before the original panel, the full court voted that the case be considered en banc, and the parties thereafter reargued the case before the en banc court. *See* Third Circuit Internal Operating Procedure 9.4.

II. DISCUSSION

On this appeal, we are asked to answer two questions: (1) whether a court should apply the PLRA's attorney's fee limitation provisions to prisoner civil rights cases pending at the time of its enactment and, if so, (2) whether the PLRA's attorney's fee provisions violate the equal protection of the law guarantee inherent in the Fifth Amendment of the United States Constitution.[4] Because these issues present questions of law, our review is plenary.

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district court's January 9, 1998 order. As we have explained, attorney's fee awards are not appealable until the court determines their amount. *See Government Guar. Fund of the Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 308 (3d Cir. 1996). Accordingly, because Collins filed his notice of appeal less than 30 days after entry of the district court's February 17, 1998 order awarding a quantified amount of attorney fees, his appeal is timely.

4. The defendants (other than the United States) argue that because Collins cashed his check for attorney's fees, which included an accord and satisfaction notation, he has waived any right to appeal the district court's fee award. It is well settled, however, that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the judgment, standing alone, does not amount to an accord and satisfaction of the entire claim. *See United States v. Hougham*, 364 U.S. 310, 312, 81 S.Ct. 13, 16 (1960). The defendants knew that Collins was unsatisfied with his fee award; Collins filed and served his notice of appeal prior to cashing his check. In addition, the defendants do not contend that they sent the check pursuant to any settlement negotiations or agreement. In these circumstances, Collins has not waived his right to appeal by cashing his check.

A. *Retroactivity Questions*

The PLRA's attorney's fee limitation provisions are found at 42 U.S.C. § 1997e(d), which provides in relevant part:

> (d) Attorney's Fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that—
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [42 U.S.C. § 1988]; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18[, the Criminal Justice Act,] for payment of court-appointed counsel . . . .

These PLRA attorney's fee limitation provisions raise three retroactivity questions here. With respect to consideration of compensation based on the time a plaintiff's attorney has expended on the case, the PLRA limits attorney's fees to an hourly rate not greater than 150% of the hourly rate for court-appointed counsel established under the Criminal Justice Act in the applicable district. In this case, the hourly rates allowed on the basis of 150% of the Criminal Justice Act rates were

$97.50 for court time and $67.50 for time out of court. As we have indicated, however, the court applied the limitations only to services after the effective date of the PLRA, and the defendants do not contend that the limitations should have been applied to earlier services. Collins contends, however, that the hourly rate provisions should not be applied at all in this action as he filed it before the enactment of the PLRA.

Another limitation is predicated on the amount of the recovery and provides that the fees awarded cannot exceed 150% of the judgment. In this case, as the judgment was for $20,000, the district court capped the fee at $30,000. In this regard, we point out that the defendants do not contend that the fees awarded Collins' attorneys for pre-PLRA services should count against the $30,000 cap and thus the district court applied the cap only against the fees for post-PLRA services. Inasmuch as the fees for post-PLRA services calculated on the basis of the hourly rate limitation was $30,025.30, the capping provision reduced the attorney's fees by the nominal amount of $25.30 to $30,000. Collins nevertheless contends that the cap should not be applied in this case in any degree as he filed it before the enactment of the PLRA.

The third provision is a fee limitation only in the sense that it places responsibility for the fees on the plaintiff by requiring that a portion of the judgment (not to exceed 25%) be applied to satisfy the award of attorney's fees. Here the district court allotted 2.5% of the responsibility for the fee to Collins.[5] Collins contends that no portion of his judgment should have been applied to the attorney's fees.

Congress did not clearly define the temporal reach of any of the three limitation provisions so we must consider

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5. Conceivably, depending upon the amount of the judgment and of the attorney's fees awarded, the plaintiff could be responsible for all of the fees. We point out that there might be some difficult questions raised in a case in which a prisoner obtains extensive and important equitable relief and a modest award of damages. Perhaps in such a case an attorney's fee would not be limited by the cap in 42 U.S.C. § 1997(e)(d)(2). We, however, leave that question to another day as Collins recovered only monetary damages.

whether as applied here they have a retroactive effect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1505 (1994). The Court of Appeals for the District of Columbia Circuit in *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998), recently addressed this issue in part. The court concluded that it would join the Court of Appeals for the Eighth Circuit in *Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997), "in holding that retroactivity concerns are not implicated when the statute is applied to work performed after April 26, 1996, the date of passage of the PLRA." *Inmates of D.C. Jail*, 158 F.3d at 1360. The court went on to explain:

> When it is applied to work performed after the effective date of the Act, the PLRA raises none of the retroactivity concerns that require the analysis used by the district court because the statute creates present and future effects on present and future conduct, and has no effect on past conduct. *Compare* [*Jensen v. Clarke*, 94 F.3d 1191, 1203 (8th Cir. 1996)] (holding that the PLRA did not apply to pre-Act work) *with Williams*, 122 F.3d at 1094 (holding that as applied to work performed after the passage of the Act, there is no retroactivity). The fees at issue were earned after the PLRA passed. The PLRA does not in this case upset vested interests because no right to a fee existed until the work was done. Because we find no retroactive effect, we need not consider the Supreme Court's extensive analysis of when to permit retroactive application. See *Landgraf*, 511 U.S. 244; [*Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997)]. As the Supreme Court stated in Landgraf, normally a court is to apply the law in effect at the time it renders its decision. 511 U.S. at 264 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)).
>
> In *Landgraf*, the Supreme Court noted that it has adopted a functional definition of retroactivity. See *id.* at 268-69 & n.23. In *Miller v. Florida*, it stated that [a] law is retrospective if it changes the legal consequences of acts completed before its effective date. 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) . . . .

> To determine if a statute has retroactive effect, the court must decide whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. In determining whether the statute has retroactive effect, the court should consider fair notice, reasonable reliance, and settled expectations. *Id.* at 270, 114 S.Ct. 1483. In this case, the work at issue was not done until after the passage of the Act. The attorneys did not possess a right to payment until they performed the work for which the fees were awarded, and thus had no settled expectations. Simply put, as applied in this case, the PLRA does not impair rights or upset expectations that did not exist prior to its passage, and could not exist after its passage. Because we hold only that the fee limitations apply to work performed after the passage of the Act, there is no need to continue the retroactivity analysis.

Inmates of D.C. Jail, 158 F.3d at 1360-61 (internal quotation marks omitted). Thus, the court in *Inmates of D.C. Jail* held "that applying the fee-capping provisions of [42 U.S.C. § 1997e(d)] to work performed after April 26, 1996, does not implicate retroactivity concerns." *Id.* at 1361.

We agree with the foregoing analysis, and thus we follow it.[6] While *Inmates of D.C. Jail* was not concerned with the limitation provision based on the size of the judgment, that provision raises no additional retroactivity problems here as the district court awarded Collins fees for pre-PLRA services on an hourly basis without regard for any of the PLRA's limitations. Thus, we hold that the attorney's fees limitation provisions of the PLRA predicated on hourly rates and the

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6. We are aware of but do not follow *Hadix v. Johnson*, 143 F.3d 246 (6th Cir.), *cert. granted*, 119 S.Ct. 508 (1998), which reached a contrary result. We have no reason to express an opinion on whether the PLRA limitations could be applied to cap fees for services performed before its effective date as the defendants do not contend that it should be so applied.

amount of the judgment simply do not have retroactive effect, at least when, as here, a court applies them solely to limit fees awarded for services performed after the effective date of the Act based on a judgment entered after that date. *See also Madrid v. Gomez*, 150 F.3d 1030, 1039 (9th Cir. 1998).[7]

We, however, face a question not involved in *Inmates of D.C. Jail*, namely whether the PLRA provision that requires application of a portion of the judgment to payment of attorney's fees has a retroactive effect. *See Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 159-60 (3d Cir. 1998), *cert. denied*, 1999 WL 86955 (Apr. 19, 1999) (No. 98-1319). The Supreme Court in *Landgraf* indicated that to determine whether a statute has retroactive effect a court must decide, *inter alia*, whether "it would impair rights a party possessed when he acted." *Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505.

Here the application of a portion of the judgment to the attorney's fees does have a retroactive effect because under 42 U.S.C. § 1988 when Collins brought this action he could have anticipated applying to the court for an award of all of his reasonable attorney's fees. While undoubtedly even before the enactment of the PLRA various factors might have limited the amount of the award, *see Washington v. Philadelphia County Ct. of Common Pleas*, 89 F.3d 1031 (3d Cir. 1996), when Collins brought this action and then applied for the appointment of counsel prior to the PLRA's enactment, he had no reason to believe that the court would order that a portion of his judgment, if he obtained one, would be used to satisfy the attorney's fees that the court awarded. Moreover, the various factors that could have led a court before enactment of the PLRA to reduce a

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7. Our result is not inconsistent with our opinion in *Gibbs v. Ryan*, 160 F.3d 160 (3d Cir. 1998), in which we held that the three strikes provision of the PLRA, 28 U.S.C. § 1915(g), did not permit the district court to revoke an order granting *in forma pauperis* status entered prior to the effective date of the PLRA. In *Gibbs* we pointed out that the three strikes provision limited a prisoner's right to "bring a civil action or appeal a judgment." 160 F.3d at 162. Obviously, in *Gibbs* the prisoner already had brought his action before the enactment of the PLRA. In this case the fees were awarded after the enactment of the PLRA.

fee application continue to be applicable after its enactment. Thus, we see no escape from the conclusion that the PLRA has a retroactive effect in this case to the extent that it requires that a portion of a judgment be applied to pay attorney's fees.

The PLRA does not indicate whether 42 U.S.C. § 1997e(d) should be applied retroactively, and we find no clear congressional intent from any other source to apply the statute retroactively. In these circumstances, we will apply the judicial default rule recognized in *Landgraf* that when Congress does not state its intent with respect to retroactivity a statute with a retroactive effect will be applied prospectively. *See Landgraf*, 511 U.S. at 280, S.Ct. at 1505; *see also Lindh v. Murphy*, 117 S.Ct. 2059, 2062 (1997); *Mathews*, 161 F.3d at 159-60. Consequently, we will modify the order of February 17, 1998, to the extent that it applied a portion of the judgment to satisfy attorney's fees by eliminating that provision.

B. *Constitutional Questions*

Collins argues that the PLRA's attorney's fee limitation provisions violate equal protection of the law by withdrawing from prisoners but not other plaintiffs the right under 42 U.S.C. § 1988 to an award of reasonable attorney's fees upon prevailing in a civil rights action. Collins contends that by "virtually eliminating the potential for a prisoner's recovery of reasonable fees, the Act severely impairs the ability of prisoners to obtain counsel without similarly affecting the ability of non-prisoners."

In this case we are concerned only with the constitutionality of the attorney's fee limitation provisions limiting the attorney's fees to 150% of the judgment and limiting the hourly rates to 150% of the hourly rates for court-appointed counsel under the Criminal Justice Act in the applicable district. Obviously, we do not face any constitutional question with respect to application of a portion of the judgment to satisfaction of the attorney's fees as we have eliminated that application in this case on a nonconstitutional basis.

We have divided equally on the question of whether the limitation of the fees to 150% of the judgment is

constitutional and consequently we will affirm the order of the district court to the extent that it upheld that provision. This disposition renders the constitutional challenge to the hourly rate limitation provision moot as the hourly rate limitation standing alone would allow Collins $30,025.30 in fees, a sum exceeding the $30,000 cap predicated on 150% of the judgment. Consequently, an invalidation of the hourly rate limitation could not enhance the fees allowed for no matter what the hourly rate allowed for Collins' attorneys' services the fee cannot exceed $30,000 for post-PLRA services. Therefore, we will not decide whether the hourly rate limitation violates a prisoner's rights to equal protection of the law.

III. CONCLUSION

For the foregoing reasons we will modify the order of February 17, 1998, to the extent that it allocated $750 of the attorney's fee to Collins and will remand the case to the district court to enter an amended order reflecting our determination. Thus, the defendants against whom the monetary damages judgment was entered will be responsible for the entire $30,000 fee. We otherwise will affirm the order of February 17, 1998. The parties will bear their own costs on this appeal.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL T. COLLINS	:	CIVIL ACTION
	:	
v.	:	
	:	
JULIO M. ALGARIN, JAMES A. FREY, EDWIN NEGRON, ALFRED RICCI, MARK GRIFFITH, FRANK GRIFFITH, DAVID DOMBROSKI, JOSEPH WALSH & DELORES MARTIN	:	FILED JAN - 9 1998
	:	NO. 95-4220

MEMORANDUM AND ORDER

Norma L. Shapiro, J. January 9, 1998

Plaintiff Michael T. Collins ("Collins") filed a civil rights action against various prison officials. A jury found in favor of Collins and against two of the defendants. Collins filed a petition for attorney's fees under 42 U.S.C. § 1988. Defendants argued the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(d), attorney's fees provisions effective after Collins filed suit, control the amount of fees Collins can recover for work performed after the date of its enactment. Collins argued the PLRA violates the Equal Protection Clause and its application would have an impermissible retroactive effect. The United States, permitted to intervene under 28 U.S.C. § 2403, submitted a legal memorandum supporting the constitutionality of the PLRA. For the reasons stated below, the court finds the PLRA constitutional and applicable to all legal work performed after the date of enactment.

ENTERED: 1/12/98

CLERK OF COURT

FACTS

Collins, a state prisoner confined at the State Correctional Institute at Camp Hill, Pennsylvania ("Camp Hill"), was transferred to the Montgomery County Correctional Facility ("MCCF") in Eagleville, Pennsylvania, for a Montgomery County court appearance. On July 27, 1995, Collins, alleging violations of his rights under the First, Eighth and Fourteenth Amendments, filed a *pro se* complaint based on 42 U.S.C. § 1983[1] against twenty-three Montgomery County prison officials.

The court appointed counsel for Collins; counsel filed second and third amended complaints against the Montgomery County Board of Prison Inspectors (the "Prison Board") and nine prison officials (collectively the "defendants"). The complaints alleged the following: 1) on March 3, 1995, prison guards at MCCF beat Collins;[2] 2) on June 28, 1995, MCCF prison guards used excessive force against Collins and repeatedly "sicced" a police dog on Collins; and 3) the Prison Board and the warden of MCCF approved and implemented an unconstitutional policy allowing the use of a K-9 unit inside MCCF.

The trial on the claims involving the K-9 unit began December 9, 1996. The jury returned a verdict in favor of Collins and against defendants Alfred Ricci ("Ricci") and Edwin Negron ("Negron") on December 16, 1996. The jury awarded Collins $15,000 in compensatory damages against Negron and Ricci, $2,000 in punitive damages against Negron and $3,000 in punitive damages against Ricci. Collins did not

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1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

2. The court severed the March 3, 1995 claim. The parties subsequently stipulated to a dismissal with prejudice of any claims arising out of this incident.

prevail on his claim that the Prison Board and the MCCF warden implemented an official policy to use the K-9 unit in an illegal manner. Collins prevailed on one of his three claims against two of the ten defendants in his amended complaints.

Collins filed a petition for attorney's fees under 42 U.S.C. § 1988. Defendants and intervenor the United States argued the PLRA limits the amount of attorney's fees Collins can recover for work performed after its effective date on April 26, 1996.

DISCUSSION

I. Attorney's Fees in Prisoner Litigation

A successful civil rights plaintiff is entitled to recover reasonable attorney's fees under 42 U.S.C. § 1988.[3] *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). Collins was successful against two defendants. Although his success was limited, Collins was a "prevailing party"; Collins "succeeded on [a] significant issue in litigation which achieved some of the benefit [he] sought in bringing suit." *Texas State Teachers Ass'n v. Garland Indep Sch Dist.,* 489 U.S. 782, 7981-92 (1989); *see also City of Riverside v. Rivera,* 477 U.S. 561, 570 (1986) (plurality).

The PLRA was enacted on April 26, 1996 (the "enactment date"), after Collins filed suit and before his attorneys performed most of their legal work. The PLRA attorney's fees provisions pertain to "any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in

3. 42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title,, [sic] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

which attorney's fees are authorized under section 1988 of this title." 42 U.S.C. § 1997e(d)(1). Three provisions of the PLRA are relevant here.

First, "[w]henever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). This provision requires the court to deduct from the plaintiff's judgment a portion of attorney's fees awarded plaintiff's counsel.

Second, "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." *Id.* This limits the total amount of attorney's fees paid by the defendants to 150 percent of the plaintiff's judgment.

Third, "[n]o award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3). This provision places an upper limit on the attorney's hourly billing rate upon which the court bases an award of fees. The issue is what effect these provisions have on actions pending on the date of enactment, April 26, 1996.[4]

II. Application of the PLRA to Actions Pending on the Date of Enactment

Application of the PLRA attorney's fees provisions to actions pending on the date of enactment raises the issue of retroactivity The Due Process Clause "protects the interest in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Products,* 511 U.S. 244, 266 (1994). Retroactive legislation deserves judicial attention because it may involve the legislature's "sweep[ing] away settled expectations suddenly and without individualized con-

4. The only attorney's fees at issue in this case are those billed after April 26, 1996. The defendants have paid the costs and fees billed on or before that date.

sideration" or responding "to political pressures [to act] against unpopular groups or individuals." *Id.*

Landgraf established a two-part test for analyzing legislation having a potential retroactive effect: 1) examine "whether Congress has expressly prescribed the statute's proper reach"; and 2) when "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Id.* at 280.

A. Congressional Intent

Congress did not expressly state if the PLRA attorney's fees provisions apply to actions pending on the enactment date. The PLRA is comprised of ten sections; the attorney's fees provisions, codified at 42 U.S.C. § 1997e(d), are contained in § 803. Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions.[5] Collins argues that Congress did not intend the attorney's fees provisions of § 803 to apply to pending actions; he relies on *Lindh v. Murphy,* 117 S. Ct. 2059 (1997). In *Lindh,* the Court considered whether the Antiterrorism and Effective Death Penalty Act's ("AEDPA") amendments to chapter 153 of Title 28 applied to actions pending on the date of enactment. Congress was silent on the issue, but had explicitly provided the AEDPA's amendments to chapter 154 of Title 28 "shall apply to cases pending on or after the date of enactment of this Act." AEDPA, Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996).

The Court focused on the effects of the two provisions. The amendments to chapter 153 established new standards for review of habeas corpus petitions filed by state prisoners; the amendments to chapter 154 provided for review of habeas corpus petitions filed by state prisoners under capital sentences. *See Lindh* 117 S. Ct. at 2063-64. The Court found it

5. Section 802 provided: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." PLRA, Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70 (1996).

"significant" that both provisions "govern[ed] standards affecting entitlement to relief," and "everything we have just observed about [the effects of] chapter 154 is true of changes made to chapter 153." *Id.* at 2064. Because the two provisions of the AEDPA were so similar in their effects, the Court determined Congress must have intentionally omitted language prescribing application of the chapter 153 amendments to pending actions. *See id.* at 2064-65.

Both AEDPA chapters considered in *Lindh* established the standard of review for habeas corpus petitions filed by state prisoners. No such similarity exists between §§ 802 and 803 of the PLRA. When enacting § 802, dealing with prospective relief, Congress had on record numerous injunctions and consent decrees retaining continuing jurisdiction over state and local prisons. Congress specifically addressed the application of § 802 to pending actions to make clear it intended the prospective relief provisions of the PLRA to apply to all prospective relief, whether such relief was granted or approved before or after the date of enactment. *See Salahuddin v. Mead,* No. 95-8581, 1997 WL 357980 (S.D.N.Y. Jun. 26, 1997) (Congress included this language in § 802 "in order to emphasize the unusually far-reaching consequences of this retroactivity provision.").

Section 803 provides limitations on attorney's fees and is not so similar to § 802 to permit an inference of intent from Congressional silence in § 803 compared to § 802. The failure of Congress to include language in § 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer,* 501 U.S. 380, 396 n.23 (1991); *see also Harrison v. PPG Industries, Inc.,* 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). Congress did not expressly provide that the PLRA attorney's fees provisions apply to pending actions.

B. Retroactivity

The court must decide whether application of the provisions to Collins would have an impermissible retroactive effect. *See Landgraf,* 511 U.S. at 280.

"Retroactivity is not favored in the law. . . ." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). However, courts generally are to apply the law in effect at the time they render their decision, "even though that law was enacted after the events that gave rise to the suit." *Landgraf*, 511 U.S. at 273. "[E]ven where the intervening law does not expressly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 715 (1974) (citing *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 282 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)).

Applying a statute to pending actions will have an impermissible retroactive effect only if it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. To be impermissible, application of the statute must do more than "upset[] expectations based in prior law." *Id.* at 269. The "potential unfairness of retroactive civil legislation is not a sufficient reason for a court" to refrain from applying it to pending cases. *Id.* at 267.

There is an impermissible retroactive effect if application of the statute to a pending action amounts to an "injustice." *Bradley*, 416 U.S. at 717; *see Lindh*, 117 S. Ct. at 2063 (intervening statute changed "standards of proof and persuasion in a way favorable to [the] state"). If the new statute causes a "change in the substantive obligation of the parties," application of the statute may be impermissible. *Bradley*, 416 U.S. at 721. New statutes cannot be applied to pending actions if they would "infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720.

"No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White*, 243 U.S. 188, 198 (1917). " 'If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.' " *Landgraf*, 511 U.S. at 270 n.24 (citation omitted).

Attorney's fees determinations " 'are collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.' " *Landgraf*, 511 U.S. at 277

(quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-52 (1982)). Application of new statutory provisions regarding attorney's fees provisions to pending civil actions does not " 'impose an additional or unforeseeable obligation' " upon the parties. *Id.* at 278 (quoting *Bradley*, 416 U.S. at 721)); *see Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922-23 (2d Cir. 1992); *Simmons v. Lockhart*, 931 F.2d 1226, 1229-31 (8th Cir. 1991).

No Third Circuit decision addresses application of the PLRA attorney's fees provisions to actions pending on April 26, 1996, but two other courts of appeals have determined the provisions apply to legal fees earned in actions pending on the date of enactment. *See Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997); *Alexander S. v. Boyd*, 113 F.3d 1373, 1388 (4th Cir. 1997). In *Williams*, the court simply stated § 1997e(d) "applies to all hours worked in this case after the date of the passage of the Act. This is not a 'retroactive' application of the new law." *Williams*, 122 F.3d at 1094.

The *Alexander S.* court focused on the "secondary" nature of attorney's fees and held the PLRA's attorney's fees provisions did not disrupt any matured rights of the parties. *See Alexander S.*, 113 F.3d at 1387-88. The court determined "a statute has a retroactive effect under *Landgraf* only when it negatively impacts a party's expectations or rights." *Id.* at 1387 n.12. The PLRA fee provisions only "upset the expectations of Plaintiff's counsel," but that was not enough to create an impermissible retroactive effect. *Id.* The court determined the PLRA fee provision did not "attach new legal consequences to completed events," *id.* at 1388; nor were the provisions "so fundamentally unfair as to result in manifest injustice." *Id* .[6]

District courts addressing the application of the PLRA fee provisions to pending cases are divided. Some courts have held the provisions apply to all work performed after the enactment date, *see Hadix v. Johnson*, 947 F. Supp. 1113, 1115

6. The court also held the PLRA provisions had to be applied to all legal work in pending cases performed prior to the date of enactment. *See Alexander S.*, 113 F.3d at 1377. That is not at issue in the present case.

(E.D. Mich. 1996) ["Hadix, I"], but others have held application of the PLRA fee provisions to pending cases, even for work performed after the enactment date, would be impermissible. *See Campbell v. McGruder,* Nos. 71-1462, 75-1668, slip op. at 3-6 (D.D.C. October 28, 1997); *Blisset v. Casey,* 969 118, 129 (N.D.N.Y. 1997); *Hadix v. Johnson,* 965 F. Supp. 996, 1001 (W.D. Mich. 1997) (citing cases) ["*Hadix II*"].

Collins relies heavily on *Cooper v. Casey,* 97 F.3d 914 (7th Cir. 1996), *Jensen v. Clarke,* 94 F.3d 1191 (8th Cir. 1996), and *Weaver v. Clarke,* 933 F. Supp. 831 (D. Neb. 1996), *aff'd* 120 F.3d 852 (8th Cir. 1997), *cert. filed,* 66 U.S.L.W. 3298 (Oct. 8, 1997), but these cases are distinguishable. In *Jensen,* the court determined the PLRA fee provisions could not be applied to a pending action because the PLRA "was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made, or even when we remanded this case to the District Court." *Jensen,* 94 F.3d at 1202. Here, the PLRA was enacted well before the liability and attorneys' fee determinations. In *Williams,* the court of appeals specifically limited the *Jensen* holding to situations where the work was performed prior to the enactment date. *See Williams,* 122 F.3d at 1094. Collins has recovered attorney's fees for work performed prior to the enactment date.[7]

The *Cooper* court refused to apply the PLRA fee provisions to a pending action because it would interfere with "completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the [PLRA]." *Cooper,* 97 F.3d at 921. In *Weaver,* "all of the action that triggered entitlement to an attorney's fee award took place prior to the date of enactment of the PLRA." *Weaver,* 933 F. Supp. at 835. Here, the PLRA was enacted well before the liability and attorney's fee determinations. Collins is attempting to obtain attorney's fees for work performed after the enactment date, so these cases are inapposite.

After April 26, 1996, Collins' attorneys had notice of the PLRA and its potential effect on any attorney's fees award to which they might be entitled. Plaintiff's counsel may have had

7. *See* Order dated November 4, 1997.

an expectation of receiving fees if plaintiff ultimately was successful, but there was never an entitlement in any particular fee amount. "Even after a victory on the merits or a declaration of entitlement to fees an attorney has no right to a specific fee under § 1988 until the actual fees are awarded." *Alexander S.*, 113 F.3d at 1392 (Motz J., concurring). Applying the PLRA fee provisions to Collins will not "impair rights [he] possessed when he acted, increase [his] liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Limiting prisoners' attorneys' fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." *Hadix I*, 947 F. Supp. at 1115. Therefore, the court finds application of the PLRA fee provisions will not create an impermissible retroactive effect.

III. Equal Protection

Collins also argues that, even if the PLRA fee provisions do not have an improper retroactive effect, they violate the principal of equal protection under the law.[8] Collins argues the fee provisions place "prisoners in a different class than all other civil rights litigants for purposes of attorneys' fees under 42 U.S.C. § 1988." Pltff.'s Supp. Mem. Supp. of Att. Fees at 9 ["Pltff.'s Supp. Mem."] Collins argues: 1) these provisions burden a fundamental right and fail under strict scrutiny analysis; and 2) even if rational basis review applies, the provisions are irrational.

A. Strict Scrutiny

When legislation classifies by certain suspect categories or "impinge[s] upon personal rights protected by the Constitution," a heightened level of scrunity applies. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The government must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S.

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8. The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. art. V. This clause encompasses equal protection of law. *See Mathews v. Castro*, 429 U.S. 181, 181 n. 1 (1976).

202, 217 (1982); *see Cleburne*, 473 U.S. at 440 ("suitably tailored to serve a compelling state interest"). Collins concedes prisoners do not form a suspect class requiring strict scrutiny of the legislation; he bases his argument on the alleged interference with his fundamental right of access to the courts.

Federal courts "must take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley*, 482 U.S. 78, 84 (1987). "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.' " *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

Collins argues the "PLRA attorneys' fees provisions combine to increase substantially the risk of nonpayment of fees and to decrease the amount of payment, making prison litigation much less feasible and attractive to private counsel." Pltff.'s Supp. Mem. at 14. Because private counsel will be less willing to assume *pro bono* representation of indigent prison inmates, the PLRA fee provisions place a burden on the prisoner's ability to conduct litigation.

The PLRA fee provisions do not hamper an inmate's ability to file or prosecute a lawsuit; they merely make it more difficult to obtain *pro bono* representation by private firms. The Supreme Court has not recognized that burdens of this limited nature violate the fundamental right of court access. In *McCarthy*, the Court found filing deadlines imposed by the Federal Bureau of Prisons "a likely trap for the inexperienced and unwary inmate." *McCarthy*, 503 U.S. at 153. This "trap" effectively cut off prisoners' access to the courts because their claims would be dismissed for technical, procedural infirmities which many prisoners would fail to understand.

Not every regulation remotely affecting a prisoner's ability to conduct litigation constitutes an infringement of the fundamental right of court access. "To the contrary, reasonable regulations that do not significantly interfere with (the fundamental right] may legitimately be imposed." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The right of court access

includes the ability to prepare and file legal documents and to avoid filing fees in certain situations. *See Lewis v. Casey,* 116 S. Ct. 2174, 2179 (1996) (citing *Johnson v. Avery,* 393 U.S. 483, 484, 489-90 (1969); *Burns v. Ohio,* 360 U.S. 252, 258 (1959); *Ex parte Hull,* 312 U.S. 546, 547-49 (1941)).

The right of access does not include the right to counsel in civil cases, even those involving constitutional issues. *See Lassiter v. Department of Social Servs.,* 452 U.S. 18, 25-27 (1981). Since a prisoner has no right to counsel in civil actions, the right to court access has not been violated because the PLRA fee provisions make it more difficult to obtain counsel.

The PLRA fee provisions do not restrict the ability of an inmate to initiate and conduct litigation. A prisoner may benefit from having counsel in civil actions, but has no right to demand representation. The Constitution "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Lewis,* 116 S. Ct. at 2182. The PLRA fee provisions do not impermissibly burden the right of court access; strict scrutiny is not appropriate.

B. Rational Basis Review

If "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end." *Romer v. Evans,* 116 S. Ct. 1620, 1627 (1996). The "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne,* 473 U.S. at 440. "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " *Heller v. Doe,* 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993)).

The PLRA legislative history does not reveal the Congressional purpose in enacting the attorney's fees provisions, but a general purpose of the PLRA was "to discourage the filing of frivolous suits and appeals by prisoners." *McGann v. Commissioner of Social Sec. Admin.,* 96 F.3d 28, 31 2d Cir.

1996).[9] Collins argues the PLRA fee provisions are irrational because they do not further that goal.

The PLRA fee provisions require that successful prisoners pay a portion of their attorney's fees. *See* 42 U.S.C. § 1997e(d)(2). Requiring prisoners to contribute to their attorney's fees may create a disincentive to filing lawsuits in general and frivolous lawsuits in particular. The provision limiting attorney's fees hourly rates to 150 percent of the amount allowed for court-appointed counsel, *see* 42 U.S.C. § 1997e(d)(3), may have been an attempt to bring the fees earned by prisoners' lawyers in civil actions more in line with those earned by court-appointed attorneys in criminal actions. There is no question most criminal counsel are effective despite the lower fees.

Collins argues the fee provisions are both too narrow, because they do not reach frivolous lawsuits filed by prisoners proceeding *pro se,* and too broad, because they do reach non-frivolous lawsuits filed by successful prisoners. But the court must uphold the legislation " 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Heller,* 509 U.S. at 320 (quoting *Beach Communications,* 508 U.S. at 313). A court cannot overturn legislation merely because "there is an imperfect fit between means and ends." *Heller,* 509 U.S. at 321. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theater Co. v. Chicago,* 228 U.S. 61, 69-70 (1913).

The burden is on Collins "to negate every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973). As long as the PLRA fee provisions "find some footing in the realities of the subject addressed by the legislation," *see Heller,* 509

9. The fact that Congress did not enunciate its purposes is irrelevant, because "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' " *Heller,* 509 U.S. at 320 (quoting *Nordlinger v. Hahn,* 505 U.S. 1, 15 (1992)). The statute "may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications,* 508 U.S. at 315.

U.S. at 321, the court must uphold them, even if they seem "unwise" or work "to the disadvantage of a particular group, or if the rationale . . . seems tenuous." *Romer,* 116 S. Ct. at 1627. Collins has not met that burden; the PLRA attorney's fees provisions are constitutionally applied to cases pending on its enactment date.

IV. Attorney's Fees Calculation

The PLRA requires that attorney's fees are awarded at an hourly rate no more than 150 percent of the hourly rate established under 18 U.S.C. § 3006A for payment of court-appointed counsel. *See* 42 U.S.C. § 1997e(d)(3). Section 3006A[10] currently provides that court-appointed attorneys are paid $60 per hour for time spent in court and $40 per hour for time spent out of court unless the Judicial Conference determines a higher rate is justified in a district. In this district, the hourly rates are $65 for time spent in court and $45 for time spent out of court. Under the PLRA, the maximum hourly rates are $97.50 for time spent in court and $67.50 per hour for time spent out of court.

Collins' attorney, Stephen G. Harvey ("Harvey"), skillfully represented Collins and is entitled to the full amount authorized by statute ($97.50 per hour). The court will award fees for time spent by associate counsel Michelle H. Yeary ("Yeary"). Yeary is billed by the firm at $95 per hour, so that is her maximum hourly rate for time spent in court. Likewise, the limited time spent by plaintiff's counsels' supervising partner, Philip J. Katauskas ("Katauskas"), was reasonable and

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10. 18 U.S.C. § 3006A(d)(1) states:

> Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. . . .

meant to ensure the quality of representation. The court will also award fees for the reasonable time he spent out of court. The court will award each of them the full amount permitted under the statute ($67.50 per hour) for their time spent out of court. The total amount of fees since the effective date will be no more than 150 percent of the judgment. *See* 42 U.S.C. § 1991e(d)(2).

Under the PLRA, the court must deduct from the full attorney's fee award a portion (up to 25 percent) to be paid by the plaintiff. *See id.* The PLRA does not impose any minimum percentage that must be applied toward the fees. Plaintiffs engaging an attorney on a contingent-fee basis commonly pay one-third or even two-fifths of their recovery to their attorneys; there is nothing abhorrent in requiring a successful prisoner-plaintiff to pay a portion of the attorney's fees. A plaintiff filing an action prior to the enactment of the PLRA may have had an expectation (although not a "matured right") of keeping 100 percent of his judgment under § 1988 at the time he filed suit, an expectation that may have influenced his request for counsel, the court may take this into account in determining the percentage (up to 25 percent) to be deducted from his judgment toward attorney's fees award. This is not unfair to defendants who understood when the action was filed that they would pay attorney's fees in their entirety if they did not settle the case or prevail at trial.

It is not possible to calculate the appropriate fee from the materials presented. Plaintiff's attorneys shall resubmit their fee petition allocating the time between that in court and not in court. Court time shall be calculated at $97.50 for Harvey and $95.00 for Yeary, and out-of-court time shall be calculated at $67.50 for both of them as well as for Katauskas.

The total amount will be substantially less than that claimed by plaintiff's attorneys, but it may not be substantially less than the amount awarded by the court prior to enactment of the restrictions imposed by the PLRA. The quality of representation was exceptional. However, plaintiff brought suit against twenty-three, later ten, defendants for three incidents allegedly violating his constitutional rights; he ultimately prevailed against two defendants on one of his three claims. The

fees claimed were approximately four times the jury's award of damages and might well have been reduced pre-PLRA under *Hensley.*

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL T. COLLINS	:	CIVIL ACTION
v.	:	
JULIO M. ALGARIN,	:	
JAMES A. FREY,	:	
EDWIN NEGRON,	:	
ALFRED RICCI,	:	
MARK GRIFFITH,	:	
FRANK GRIFFITH,	:	
DAVID DOMBROSKI,	:	
JOSEPH WALSH &	:	
DELORES MARTIN	:	NO. 95-4220

ORDER

AND NOW, this 9th day of January, 1998, upon consideration of plaintiff Michael T. Collins' ("Collins") petition for attorney's fees, the responses by defendants and intervenor the United States, after a hearing in which counsel for all parties were heard, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Collins' attorneys shall be awarded reasonable attorney's fees in accordance with the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), for time expended after April 26, 1996.

2. Collins' attorneys shall submit a revised fee petition within ten (10) days allocating their time between in court and out of court time after April 26, 1996.

Norma L. Shapiro, J.

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42 U.S.C.A. § 1997e

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21—CIVIL RIGHTS
SUBCHAPTER I-A—INSTITUTIONALIZED PERSONS

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Current through P.L. 106-20, approved 4-9-99

§ 1997e. Suits by prisoners

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 [FN1] of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 [FN1] of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

42 USCA s 1997e

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 [FN1] of this title.